No. 10-860

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In The
Supreme Court of the United States

GEORGE REPKING, ADMINISTRATOR OF THE ESTATE OF CHRISTINA SPRINGS, and KELLY REPKING, on behalf of herself and her minor daughter, P.G.,

Petitioners,

v.

BRAD LOKEY and RANDY REED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF OF RESPONDENTS, BRAD LOKEY AND RANDY REED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Arkansas Supreme Court's thorough analysis of the material facts does not conflict with a decision of this Court and is consistent with the analysis applied by the several Courts of Appeals, and where the Arkansas Supreme Court's ruling does not implicate an important federal question that has not been settled by this Court.

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STATEMENT OF THE CASE

Christina Springs was murdered by her husband, Thomas Springs, on a busy city street in front of scores of witnesses. (Pet. App. 3). Petitioners, who are relatives of Christina Springs, filed this action below, asserting that Respondents, Fort Smith Police Officer Brad Lokey and Fort Smith Police Chief Randy Reed, individually and officially, were liable for that death. Among several causes of action put forth by Petitioners was a claim that police failure to protect Christina Springs from that murder constituted a "state-created danger" thus violating substantive Due Process. Presently, Petitioners argue that the Arkansas Supreme Court, in analyzing that 42 U.S.C. § 1983 cause of action, erroneously relied on the 8th Circuit Court of Appeals' announced standard of review in cases involving claims of a "state-created danger." That standard of review was set forth in *Hart v. City of Little Rock*, 432 F.3d 801 (8th Cir. 2005).

In reviewing the trial court's grant of summary judgment to Respondents, the Arkansas Supreme Court first found that simple negligence would not suffice to support a claim of violation of substantive Due Process. (Pet. App. 8, *citing Daniels v. Williams*, 404 U.S. 327, 328 (1986)). Then, the Arkansas Supreme Court, *quoting* from *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989), recognized that nothing in the language of the Due Process Clause itself requires a law enforcement officer to protect the life, liberty, and property of

citizens against invasion by private actors such as Thomas Springs. (Pet. App. 8).

Finding that Police Chief Reed had no personal involvement in the incident, the Arkansas Supreme Court next looked at the facts surrounding Officer Lokey's involvement. The Court noted that when he went to the elementary school in response to a call that Thomas Springs was wrongfully trying to pick up one of his children, Officer Lokey was faced with three different no-contact court orders, the most recent of which noticeably did not include any reference to the children. (Pet. App. 2). The Arkansas Supreme Court found that Lokey was unable, though he tried, to confirm which, if any, of the orders was in effect; was only aware through second-hand information that Mr. Springs might have threatened his wife; did not observe any criminal activity by Mr. Springs; and, found that Officer Lokey was under no affirmative duty to aid or protect Christina Springs from a private act of violence under the Due Process Clause. (Pet. App. 2 & 10).

The Arkansas Supreme Court then acknowledged that it recognized an exception to the absence of an affirmative right to safety under the Due Process Clause, namely, the so-called "state-created danger exception." However, the Arkansas Supreme Court said that for such a duty to protect to arise, the actions of a state actor must create a unique risk of harm to that person that is greater than the risk faced by the general public. (Pet. App. 11, *citing Davis*

v. Fulton County, Ark., 90 F.3d 1346, 1351 (8th Cir. 1996)).

The Arkansas Supreme Court further acknowledged that Petitioners opined that the Court should be using a standard of review of a "state-created danger" claim utilized by the 9th Circuit Court of Appeals, as opposed to a five step test used by the 8th Circuit in *Hart*, *supra*, which includes a "shock the conscience element." (Pet. App. 12). The Arkansas Supreme Court held that the five step test used by the 8th Circuit was the more appropriate test. In so finding, the Arkansas Supreme Court held:

> . . . Officer Lokey's actions regarding Christina's [Springs] safety, even accepting all of the facts in favor of appellants, did not exhibit deliberate indifference to her plight so as to implicate due-process concerns. Stated differently, we fail to see a genuine issue of material fact that has been presented that Officer Lokey's conduct put Christina at significant risk of serious, immediate, and proximate harm and that he acted recklessly in conscious disregard of the risk so as to shock our conscience.

(Pet. App. 12). The Arkansas Supreme Court affirmed the trial court's grant of summary judgment. Petitioners' Petition for Writ of Certiorari ensued.

ARGUMENT

Respondents, Brad Lokey and Randy Reed ("Lokey" and "Reed"), respectfully suggest the Petition

for Writ of Certiorari should be denied. Petitioners' argument that a split exists in the circuits (8th and 9th Circuits) on the standard of review used in cases involving alleged "state-created danger" is not sufficient to justify review by this Court. That "split" between two circuits (when in fact all eleven circuits as well as the D.C. Circuit adhere to an analysis that includes "shocks the conscience" or a form of it – an approved standard previously articulated by this Court in Due Process cases) is insufficient to warrant the requested review in this case. This is particularly true in light of the Arkansas Supreme Court's holding that whether it reviewed the facts in favor of Petitioners with a "deliberate indifference" standard or an "intent to harm" standard under the "shocks the conscience" analysis, the grant of summary judgment in favor of Lokey and Reed was correct.

I. THIS COURT SHOULD DENY PETITIONERS' PETITION FOR WRIT OF CERTIORARI BECAUSE THE ALLEGED SPLIT BETWEEN THE CIRCUITS AS TO STANDARD OF REVIEW FOR "STATE-CREATED DANGER" CASES IS, IF A SPLIT EXISTS, *DE MINIMIS*.

Petitioners have asked for a Writ of Certiorari because of a perceived "direct conflict between the tests used by the Eighth and Ninth Circuits" in judicial analysis of a state-created danger claim. To the contrary, Respondents urge that the alleged split is a false or non-existent split or is *de minimis*. This case

does not involve an unsettled question of federal constitutional law of general interest.

This Court, in *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 195 (1989) stated, "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." Generally, the Due Process Clause does not provide an affirmative right to government aid, "even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196.

As Petitioners correctly note, subsequent to *DeShaney*, a majority of circuit courts of appeals have recognized an exception where there has been a "state-created danger." The Arkansas Supreme Court analyzed Petitioners' claims on appeal in light of that exception. (Pet. App. 11). Though the Arkansas Supreme Court thoroughly reviewed the material facts to determine whether the state-created danger exception had been satisfied, Petitioners urge that the Arkansas Supreme Court should not have used a standard of review that includes "shocks the conscience." To the contrary, such a proposition, if accepted, would undermine this Court's holding in *DeShaney*, *supra*. That is, Petitioners seem to be prompting this Court to overrule *DeShaney* by creating a new standard, rather than recognizing that all appellate circuits already use the "shocks the conscience" test, or a form of it, to determine if there has been "deliberate indifference" or "intent to harm" in analyzing a

"state-created danger" claim. Petitioners seem to be asking that the "shocks the conscience" element be discarded – a standard that has been used for over half a century in analyzing substantive Due Process claims. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *citing Rochin v. California*, 342 U.S. 165, 172-73 (1951); *Breithampt v. Abrams*, 352 U.S. 432, 435 (1957); *Whitley v. Albers*, 475 U.S. 312, 327 (1986); *United States v. Salerno*, 481 U.S. 739, 746 (1987); and *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992).

In the wake of *DeShaney*, the theory of a state-created danger exception has been litigated in a variety of contexts, including those involving motorists and passengers, government and citizen undercover operatives, rescues by third parties and prevention of rescues, failure to arrest, and failure to serve orders. Despite Petitioners' claim, the difference in analysis by the several circuits is not the huge gulf Petitioners maintain. A circuit-by-circuit examination reveals that the test used by the several circuits to analyze state-created danger claims does not differ to the degree claimed by Petitioners. That is, the analysis of such claims may use somewhat differing language, *e.g.*, "conscience shocking"; "egregious"; "outrageous"; "willful disregard"; "deliberate indifference"; or "subjective recklessness," but all recognize that liability can only exist where an individual has been left in a more dangerous situation than the one in which they found themselves by an officer *creating* a previously non-existing danger or actually *increasing* the danger.

The following examples demonstrate Respondents' point:

- *1st Circuit* (In affirming a motion to dismiss a plaintiff's claim under the "shocks the conscience" exception, the 1st Circuit held that while "unkept promises [by State actors] may have rendered [a decedent] more vulnerable to the danger posed . . . merely rendering a person more vulnerable to risk does not create a constitutional duty to protect." *Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir. 2005)). In fact, the 1st Circuit in *Rivera*, 402 F.3d at 38, found *DeShaney* indistinguishable from the claims alleged in the *Rivera* case:

  > Ultimately, the claims alleged in the Complaint are indistinguishable from those in *DeShaney*. The allegation that [the decedent] trusted the State to do what it said and relied on that promise . . . is not materially different from *DeShaney*, where the State was aware of the risk, by its actions expressed promises of help, and then failed to protect a young boy from his abusive father.

- *2nd Circuit* (In *Lombardi v. Whitman*, 485 F.3d 73 (2nd Cir. 2007), the 2nd Circuit held that state actors providing knowingly inaccurate information, which turned out to be tragically consequential to plaintiffs, was not so "deliberately

indifferent" that the misrepresentation "shocked the conscience" of the Court. The 2nd Circuit considered, and found wanting, the fact that federal officials had made "reassuring – and knowingly false" – announcements about air quality in lower Manhattan following the 9/11 catastrophe, to the detriment of the plaintiffs.)

- *3rd Circuit* (The 3rd Circuit adopted the state-created danger exception in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996). Later, in *Sanford v. Stiles*, 456 F.3d 298 (3rd Cir. 2006), the 3rd Circuit held that in *any* state-created danger case, under any set of facts or theory, the State actor's behavior must *always* "shock the conscience." *Id.* at 310. *Sanford* affirmed the District Court's grant of summary judgment where a 16-year-old high school student killed himself after his threat to do so was disclosed to the school's guidance counselor who had met with the decedent twice before the student took his own life, and, as alleged, acted "deliberately indifferent" to the student's problems.)

- *4th Circuit* (In reversing a District Court's judgment, the 4th Circuit held there was no Due Process right to protection from third parties based on mere assurances by State officials under an alleged state-created danger theory of

Section 1983 liability. *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995).)

- *5th Circuit* (The 5th Circuit apparently refuses to adopt a state-created danger theory exception to Section 1983 liability. *See, e.g., Longoria v. Texas*, 473 F.3d 586, 593 n.8 (5th Cir. 2006). In *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (*en banc*) (*per curiam*), the 5th Circuit held that "neither this court nor the Supreme Court has yet determined whether a citizen has a constitutional right to be free from state-created dangers" and, because the plaintiff failed to establish the necessary elements of the theory, it would not apply even if available.)

- *6th Circuit* (The 6th Circuit, in *McQueen v. Beecher Community Schools*, 433 F.3d 460, 464 (6th Cir. 2006), recognized a state-created danger exception. In doing so, it held that to demonstrate the exception requires a showing of an affirmative act that creates or increases a risk that is a special danger to the victim as distinguished from the public at large as well as a showing of a requisite degree of state culpability, namely – deliberate indifference, which means "subjective recklessness" – that "shocks the conscience.")

- *7th Circuit* (In *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003), the 7th Circuit,

in construing whether the "shocks the conscience" test *or* a "deliberate indifference" standard is an appropriate benchmark by which to determine if a police officer's conduct violates substantive Due Process, held that a police officer's opportunity to deliberate for several minutes is not tantamount to "deliberate indifference" to the point of "shocking the conscience." Comparable to the determination of the Arkansas Supreme Court in the case at hand, the Seventh Circuit held "we need not choose between the two formulations of the constitutional standard (even assuming they present different inquiries), as we believe that [the plaintiff] has not presented facts which rise to either level." *Id.* at 490-91.)

- *8th Circuit* (In *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005), the 8th Circuit held "under the State-created danger theory, [Plaintiffs] must prove (1) they were members of a limited, precisely definable group; (2) [the City's] conduct put them at significant risk of serious, immediate, and proximate harm; (3) the risk was obvious or known to [the City]; (4) [the City] acted recklessly in conscience disregard of the risk, and (5) in total, the City of Little Rock's conduct shocked the judicial conscience.")) Like the decisions of other circuits considering the issue, the 8th

Circuit's analysis turns upon the standard of "shocks the conscience."

- *9th Circuit* (In *Porter v. Osborne*, 546 F.3d 1131 (9th Cir. 2008), the 9th Circuit specifically identified and explained the standard of culpability for review of a Due Process claim based on a state-created danger exception.) Just as in the Petitioner's instant Petition for Writ of Certiorari, the parties in *Porter* mistakenly suggested to the 9th Circuit that the choice of analysis of a state-created danger exception to municipal liability is between "shocks the conscience" and "deliberate indifference," when, in fact, the 9th Circuit specifically holds the latter query is merely a subset of the former. *Porter* recognized that the U.S. Supreme Court has made it clear that only official conduct that "shocks the conscience," under either an "intent to harm" theory or a "deliberate indifference" theory is cognizable as a Due Process violation. *Id. citing County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (*citing Rochin v. California*, 342 U.S. 165, 172-73, 72 S. Ct. 205, 96 L. Ed. 183 (1952).)

- *10th Circuit* (In *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009), a case arising out of a car collision wherein an individual was killed when his vehicle was struck by a car driven by a deputy sheriff, the

10th Circuit, in construing a state-created danger exception, relied upon the 7th Circuit's holding in *Bublitz v. Cottey*, *supra*, and recognized that "to rise to the level of a constitutional violation, a deliberately indifferent act must be one which is conscience shocking." The 10th Circuit concluded that the deputy's conduct failed to meet the deliberate indifference standard, finding that his actions did not "demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking" even under a "deliberate indifference" standard.)

- *11th Circuit* (In *Waddell v. Hendry County Sheriff's Office*, 329 F.3d 1300 (11th Cir. 2003), the 11th Circuit held, in recognizing a state-created danger exception, that "even conduct by a government actor that would amount to an intentional tort under state law will rise to the level of a substantive due process violation only if it also 'shocks the conscience.'" *Id.* at 1305, *quoting Dacosta v. Nwachukwa*, 304 F.3d 1045, 1048 (11th Cir. 2002). Further, the 11th Circuit, in *Waddell*, relying on *County of Sacramento v. Lewis*, *supra*, held that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Lewis*, 118 S. Ct. 1716 (1998).)

- *D.C. Circuit* (The D.C. Circuit applies a shocks the conscience standard in

> analyzing a state-created danger exception claim. In *Smith v. District of Columbia*, 413 F.3d 86, 93 (D.C. Cir. 2005), the D.C. Circuit held "deliberate indifference will not violate due process where the state has no 'heightened responsibility toward the individual,'" *citing Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001). In the D.C. Circuit, only a state actor's "conscience shocking" conduct under a "deliberate indifference" standard will afford a cause of action under the state-created danger exception for alleged violation of substantive Due Process.)

The circuit-by-circuit review outlined above shows that the several circuits that have recognized a state-created danger exception to the otherwise non-existent duty of a governmental actor, under Due Process standards, to protect an individual citizen, all uniformly require some extreme conduct on the part of the police officer. The officer must have actually created the danger or been so cognizant of the danger that they "deliberately" or "willfully" or "egregiously" or "outrageously" ignored the then existing situation, to such an extreme that the judicial conscience is shocked. The bar for demonstrating a violation of substantive Due Process has intentionally been set high by the courts.

In the case at bar, the Arkansas Supreme Court correctly found that Officer Lokey's actions regarding

Ms. Springs' safety "even accepting all of the facts in favor of the appellants, did not exhibit deliberate indifference to her plight so as to implicate due-process concerns. . . . [There was not] a genuine issue of material fact . . . presented that Officer Lokey's conduct put Christina at significant risk of serious, immediate, and proximate harm and that he acted recklessly in conscious disregard of the risk so as to shock our conscience." (Pet. App. 12).

Even the concurring justice in the case below, while agreeing with Petitioners that the "shocks the conscience" element ought to be dropped in analyzing an alleged state-created danger claim, did agree with the majority that "Officer Lokey's conduct did not put Christina at significant risk of serious, immediate, and proximate harm." (Pet. App. 18).

Thus, while Respondents contend the Petition for Writ of Certiorari should not be granted because the alleged lack of uniformity between the circuits is either non-existent or, at most, only a minor difference of semantics as to the analysis to be applied, Respondents also urge that the facts of this particular case do not elevate it to the level that the Petition for Writ of Certiorari should be granted.

CONCLUSION

Respondents respectfully suggest the Petition for Writ of Certiorari should be denied. The reason

asserted for review by this Court is a perceived split between a couple of circuits on the standard of review of a claim of "state-created danger." In requesting review, Petitioners refer to the fact that a single circuit, the 9th Circuit Court of Appeals, does not use "shocks the conscience" as an element of that review. Juxtaposed are all of the other circuits, and a 2008 9th Circuit holding deciding the very issue Petitioners now urge, wherein "shocks the conscience," or a form of it, is the standard of review in such cases. Respondents opine that the perceived conflict is actually a false conflict. However, should it be determined that a conflict does exist between the circuits, that conflict should not, under the facts of this case, be significant enough to prompt review by this Court.

Petitioners also urge that the alleged "promise" by Officer Lokey to provide protection to Christina Springs makes this case unique and thus worthy of review. Several of the cases referenced above suggest that myriad cases involving alleged governmental "promises" have been deliberated already and that uniqueness is not present here. Furthermore, inasmuch as every Due Process claim might be said to have its own unique set of facts, adhering to Petitioners' argument would of necessity dictate review of every case by this Court. That is a *non sequitur*.

For all these reasons, Respondents, Brad Lokey and Randy Reed, respectfully request that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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